Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

NO. 78-632

Billy Paul Bullock
Wayne Lester Bullock
Allen Glen Bullock
Petitioners

V.

United States of America
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SO[illegible]

Attorney for Petitioners

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OPINIONS BELOW

Eighth Circuit. The opinion of the Court of Appeals for the Eighth Circuit (App. A. infra, pp. 11-16) is not yet reported.

District Court. The opinion of the United States District Court for the Eastern District of Arkansas, Western Division was not reported.

JURISDICTION

The judgment of the United States Court of Appeals, Eighth Circuit, was entered on the 26th day of July, 1978 (App. A, infra, pp. 11). An Order Extending Time To File Petition For Writ of Certiorari was granted by this Court on the 31st day of August, 1978, extending said time through September 25, 1978. The jurisdiction of this Court is invoked pursuant to Article III, §2 (1) of the Constitution of the United States and 28 U.S.C. Section 1254 (1).

STATEMENT OF THE CASE

On December 14, 1977, officers of the Arkansas State Game and Fish Commission, Jerry Huie and Jerry Stewart, were participating in the surveillance of Little Pecan Lake, Arkansas County, Arkansas, which was then under lease by the appellant Billy Paul Bullock as the location of his duck hunting service (T. 18, 38, 39, 62, 155). The officers observed a low flying aircraft make two passes over the lake with debris coming out of the hopper (T. 39, 65). The officers were able to photograph the plane and the debris floating on the water and to take a small sample of the debris before it could sink beneath the lake's surface. (T. 40-43, 64) The sample revealed that the debris consisted of rice and milo (T. 69, 73). On December 17, 1977, State and Federal Wildlife Officers returned to the same area and observed a party of approximately 23 people, including the three appellants, hunting ducks (T. 48, 89-94, 176).

On December 29, 1977, an information was filed charging each of the appellants with hunting over a baited area in violation of 16 U.S.C. §703. On February 1, 1978, the cause was tried before the Court, Honorable Terry L. Shell presiding, and appellants were found guilty. All appellants were sentenced to six months imprisonment. The sentences were suspended and appellant Billy Paul Bullock was fined $500.00 and placed on probation for two years. Appellant Wayne Lester Bullock was fined $300.00 and placed on probation for one year. Appellant Allen Glen Bullock was placed on probation for one year. The condition of probation for each appellant was that he not be allowed to hunt during the probationary period.

STATEMENT OF POINTS TO BE ARGUED AND AUTHORITIES RELIED ON

I.

IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANTS' MOTION FOR A TRIAL BY JURY.

CASES CITED

Duncan v. State of Louisiana, 391 U.S. 145 (1968)

Frank v. United States, 395 U.S. 147, 152 (1969)

OTHER MATERIAL CITED

United States Constitution, Sixth Amendment

II.

THE CONVICTION OF APPELLANTS WAS BARRED BY THE DOUBLE JEOPARDY CLAUSE.

OTHER MATERIAL CITED

United States Constitution, Fifth Amendment

United States Constitution, Fourteenth Amendment

ARGUMENT

I.

IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANTS' MOTION FOR A TRIAL BY JURY.

Upon a Felony Information being filed in the District Court of the Eastern District of Arkansas, Western Division, Appellants caused a Petition to be filed requesting they be given a trial by jury. Subsequently, on February 1, 1978, appellant's attorney submitted an oral motion to the court along with arguments as to why appellants should be granted a trial by jury, and said Motion was again denied. The Constitution of the United States of America Sixth Amendment provides... "for trial by an impartial jury by the accused in all criminal prosecutions."

This Constitutional provision, considered to be the supreme law of the land, does not make any provisions whatsoever for petty offenses and misdemeanors, etc. On its face, it plainly says, "...in all criminal prosecutions."

Appellants contend and argue that the Constitution of the United States does not differentiate between misdemeanors and felonies in providing for trial by jury in all cases of criminal prosecution.

The Petitioners reluctantly admit that a considerable amount of case law can be found to the effect that crimes that provide for penalities requiring no more than six months confinement are not bound to a trial by jury. *Frank v. United States*, 395 U.S. 147, 89 Sup. Ct. 1503, 23 Law Ed. Section 162 (1969). This opinion is consistent with that rendered in the case of *Duncan v. State of Louisiana*, 391 U.S. 145, 88 Sup. Ct. 1444, 20 Law Ed. Section 91 (1968).

Petitioners would argue that the provisions that trial by jury is necessary for two reasons:

(1) Defendants, and their capacity as breadwinners, businessmen in a small community, fathers, husbands and as family heads, would be subject, if convicted, to more harsh punishment and the penalties of conviction than would be accorded a habitual criminal who had been confined two or three times previously to the State Penitentiary. This would be especially true with respect to the defendants' position and reputation in a small, rural community for the defendants or any one defendant that would operate a retail business or service.

(2) In the instant case, we have defendants that were originally cited and brought into court on an information provided by agents of the U.S. Fish and Wildlife Service of the Department of Interior, a federal agency. Subsequently, a criminal information was filed in the Federal District Court of the Eastern District of

Arkansas, Western Division by officials of the U.S. Attorney's Office for that court, a federal agency. Thus, a trial on the merits of a Government's case was held in the Federal District Court for the Eastern District Court of Arkansas, Western Division with a federal judge presiding, a federal official.

In tracing the history of the jury trial in America, Mr. Justice White in the case of *Duncan v. State of Louisiana*, (Infra) stated... "Jury trial came to America with English Colonists and received strong support from them. Royal interference with the jury trial was deeply resented. Among the resolutions adopted by the First Congress of the American Colonies, (the Stamp Act Congress) on October 19, 1765—Resolutions deemed by their authors to states "the most essential rights and liberties of the colonists" / was the Declaration: "That trial by jury is the inherent and invaluable right of every British subject in these colonies." The purpose for this, as stated by Mr. Justice White, was to prevent the oppression by the Government with its various agencies which was what the government was doing in prosecuting the defendants in the instant case.

II.

THAT AMENDMENT FIVE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA PROVIDES THAT NO PERSON SHALL BE SUBJECT TO THE SAME OFFENSE TO BE PUT TWICE INTO JEOPARDY FOR LIFE OR LIMB AND THAT THE ORIGINAL CHARGES AGAINST THE

APPELLANTS WERE DISMISSED AND THEIR CHECKS RETURNED TO THEM BY LETTER FROM THE U. S. DISTRICT COURT CLERK'S OFFICE UNDER DATE OF JANUARY 4, 1978.

Appellants contend that they were advised by letter on December 21, 1977 that they, along with the 20 other people charged on December 17, 1977, could forfeit $100.00 in lieu of standing trial as the result of the incident for which appellants were convicted. Appellants herein each tendered the sum of $100.00 to the proper officials. Subsequently, on the 29th day of December, 1977 an information was filed in the Federal District Court of the Eastern District of Arkansas, Western Division, charging appellants for the violations of which they were eventually convicted and appealed therefrom. Appellants received notice under date of January 4, 1978 to the effect that their $100.00 was being returned to them and the charges were being dismissed.

Appellants contend that for criminal information charges to be filed subsequent to them having forfeited the $100.00 bond in lieu of standing trial was double jeopardy as provided against by the Fifth Amendment to the Constitution of the United States.

Appellants were of the opinion that the charges were dropped and the matter had been discharged. Subsequently, charges were dropped for 20 offenders who were charged in the same incident which appellants were convicted and appealed therefrom.

It should further be noted that appellants had accepted the government's offer when their checks were placed in the mail, and the government was precluded from prosecuting further.

Certainly, appellants contend that this was a violation of the equal protection law of the Fourteenth Amendment of the U. S. Constitution and the double jeopardy provisions as contained in the Fifth Amendment to the U. S. Constitution.

Respectfully submitted,

/s/ Robert S. Gunter
Robert S. Gunter

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Attorney for Petitioners

CERTIFICATE OF SERVICE

A copy of the above and foregoing has been mailed this 6th day of October, 1978 to Solicitor General, U. S. Department of Justice, Wasington, D.C. 20530.

/s/ Robert S. Gunter
ROBERT S. GUNTER

Attorney for Appellants

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1250

United States of America,	*	
	*	
Appellee,	*	
v.	*	Appeal from the United
	*	States District Court
Billy Paul Bullock,	*	for the Eastern District
Wayne Lester Bullock and	*	of Arkansas
Allen Glen Bullock,	*	
	*	
Appellants.	*	

Submitted: July 20, 1978
Filed: July 26, 1978

Before HEANEY, STEPHENSON and HENLEY, Circuit Judges.

PER CURIAM.

The defendants were convicted on an information charging the unlawful taking of migratory birds over a baited area, in violation of 16 U.S.C. §703 and 50 C.F.R.

§20.21 (1976). They take this appeal, alleging (1) that the evidence was insufficient and that the court erred in denying their motion for new trial; (2) that they were entitled to a trial by jury; and (3) that the conviction subjected them to double jeopardy.

I. *Sufficiency of Evidence and New Trial Motion.*

Title 16, section 703, of the United States Code provides:

> Unless and except as permitted by regulations ***, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt *** any migratory bird, *** [protected under certain conventions between the United States and foreign nations].

50 C.F.R. §20.21 (1976) provides in part as follows:

> Migatory birds on which open seasons are prescribed in this part may be taken by any method except those prohibited in this section. No person shall take migratory game birds:
>
> ***
>
> (i) By the aid of baiting, or on or over any baited area. As used in this paragraph, "baiting" shall mean the placing, exposing, depositing, distributing, or scattering of shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed so as to constitute for such birds a lure, attraction or enticement to, on, or over any area where hunters are attempting to take them; and

> "baited area" means any area where shelled, shucked, or unshucked corn, wheat or other grain, salt, or other fee whatsoever capable of luring, attracting, or enticing such birds is directly or indirectly placed, exposed, deposited, distributed, or scattered; and such area shall remain a baited area for 10 days following complete removal of all such corn, wheat or other grain, salt, or other feed.

An offense under 16 U.S.C. §703 is made punishable by 16 U.S.C. §707, which provides, *inter alia*, that the crime is a misdemeanor and that the offender is subject to a maximum prison term of six months and a fine of $500.

To make out a conviction under the above provisions, the government must show that the defendants were in pursuit of a protected species [1] from a baited area. The evidence is undisputed that on December 17, 1977, wildlife officers discovered the defendants hunting wild duck from a duck blind area maintained by defendant Billy Paul Bullock. The officers found the defendants (and others) dressed in hunting garb; guns that were checked were found "plugged." The only significant evidentiary dispute is thus whether the area was "baited."

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1. As noted above, 16 U.S.C. §703 protects only certain species—those enumerated in specified treaties between the United States and other nations. Encompassed by the statute is the Convention between the United States and Great Britain for the protection of migratory birds, concluded August 16, 1916. 39 Stat. 1702. The Convention protects, *inter alia*, "[a]natidae or waterfowl, including braut, wild ducks, geese, and swans."

The government's evidence disclosed that on December 14, 1977, agents witnessed an airplane scattering debris through the area in question. After the plane left, samples of the debris were found among the duck decoys. The samples were shown to consist of rice and milo. The defendants denied the area was baited. They suggested that the rice and milo found by the agents amounted to natural vegetation in the area. They also suggested that fluctuating water levels would wash these grains into the duck hunting area.

We are satisfied from our review of the record, taking the view most favorable to the government, that there is substantial evidence to support the district court's finding of guilt. *United States v. Marley*, 549 F.2d 561 (8th Cir. 1977); *United States v. Rischard*, 471 F.2d 105 (8th Cir. 1973). Further, there is no merit to defendants' contention that the trial court abused its discretion in denying the motion for new trial. The trial court could properly conclude that defendants' contention that "new evidence *** that tended to prove inconsistencies" in testimony would be unlikely to alter the judgment of guilt. Furthermore, with "due diligence" the additional photographic evidence could have been presented at trial. *United States v. Ward*, 544 F.2d 975, 977 (8th Cir. 1976); *United States v. McColgin*, 535 F.2d 471, 476 (8th Cir. 1976).

II. *Jury Trial.*

The defendants' contention that they were entitled to a jury trial on this petty offense is without

merit. *Baldwin v. New York*, 399 U.S. 66 (1970); *United States v. Jarman*, 491 F.2d 764 (4th Cir. 1974).

III. *Double Jeopardy.*

Defendants' final contention is that their convictions violate the protection against twice being put in jeopardy for the same offense. This contention arises out of the fact that the federal government initiated action against them by sending a notice of violation which indicated they could forfeit a bond of $100 in lieu of standing trial Defendants responded by sending in checks for $100. Several days thereafter an information was filed superseding the notice of violation, which was dismissed. Defendants' checks were returned uncashed. [2]

In a nonjury proceeding, as a general rule, jeopardy attaches when the court begins hearing evidence. *Serfass v. United States*, 420 U.S. 377 (1975). Traditionally, the process of arraignment and pleading has not been viewed as amounting to jeopardy. *Collins v. Loisel*, 262 U.S. 426, 429 (1923). Of course, jeopardy would attach when a plea of guilty is accepted. *See United States v. Williams*, 534 F.2d 119, 120 (8th Cir.), *cert. denied*, 429 U.S. 894 (1976); *United States v. Young*, 503 F.2d 1072, 1074 n.5 (3d Cir. 1974); *United States v. Jerry*, 487 F.2d 600, 606 (3d Cir. 1973).

2.
The parties have not included in the record any documents relating to these events. The rather vague account presented here is drawn from the briefs.

It is submitted that the pretrial events in this case, while arguably reflecting prosecutorial indecision, did not amount to jeopardy. *See DeMarrias v. United States*, 487 F.2d 19 (8th Cir. 1973), *cert. denied*, 415 U.S. 980 (1974).

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT